



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 29, 2011

Ms. Leticia D. McGowan  
School Attorney  
Dallas Independent School District  
3700 Ross Avenue  
Dallas, Texas 75204

OR2011-04311

Dear Ms. McGowan:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 412559 (ORR No. 9904).

The Dallas Independent School District (the "district") received a request for copies of a specified complaint filed with the district by the requestor and any other documents, e-mails, or statements having to do with the complaint. You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code, and privileged under Texas Rule of Evidence 503.<sup>1</sup> We have considered your arguments and reviewed the submitted information.

Initially, we note most of the submitted information pertains to an investigation completed by the district, and is therefore subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[.]" unless the information is expressly confidential under "other law" or excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). Although you seek to withhold the submitted information under section 552.103 of the Government Code, that section protects a governmental body's interest and may be waived. *See Dallas Area Rapid*

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<sup>1</sup>Although you raise section 552.101 in conjunction with Texas Rule of Evidence 503, this office has concluded that section 552.101 does not encompass discovery privileges. *See Open Records Decision Nos. 676 at 1-2 (2002), 575 at 1 (1990).*

*Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 542 at 4 (1990) (statutory predecessor to section 552.103 subject to waiver). As such, section 552.103 is not “other law” that makes information confidential for purposes of section 552.022. Accordingly, the information subject to section 552.022(a)(1) may not be withheld under section 552.103 of the Government Code. However, the attorney-client privilege in Texas Rule of Evidence 503 is “other law” for the purposes of section 552.022 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328. (Tex. 2001) (addressing applicability of Texas Rule of Evidence 503 to information encompassed by section 552.022). Therefore, we will consider your attorney-client privilege argument under Texas Rule of Evidence 503 for the submitted information subject to 552.022(a)(1).

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client’s lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer’s representative;
- (C) by the client or a representative of the client, or the client’s lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; or
- (E) among lawyers and their representatives representing the same client.

Tex. R. Evid. 503(b)(1). A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5). When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002).

Thus, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under Rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state the e-mail strings and attachments subject to section 552.022(a)(1) are communications or document communications between the district's representatives and its legal counsel that were created for the express purpose of soliciting legal advice and legal interpretation of issues. You state the information was not intended to be disclosed to third persons and the district has not waived its privilege. Based on your representations and our review, we conclude the e-mail strings and attachments subject to section 552.022(a)(1) may generally be withheld under Texas Rule of Evidence 503. However, we note several of these e-mails and attachments are communications between the district and the requestor, a non-privileged party. These non-privileged communications, which we marked for release, exist separate and apart from the otherwise privileged communications and, therefore, may not be withheld under Texas Rule of Evidence 503. We also note there is one e-mail contained in a privileged e-mail string. If this e-mail, which we marked, exists separate and apart from the privileged e-mail string, it may not be withheld under Texas Rule of Evidence 503 and must be released. If this e-mail does not exist separate and apart from the e-mail string, then it may be withheld pursuant to Texas Rule of Evidence 503.

The remaining information is an e-mail and attached letter not subject to section 552.022(a)(1). We will consider your attorney-client privilege argument for this information under section 552.107 of the Government Code.<sup>2</sup> Section 552.107 protects information coming within the attorney-client privilege. The test for determining whether information is protected under the attorney-client privilege under section 552.107 is the same as that discussed above under Texas Rule of Evidence 503. First, a governmental body must demonstrate that the information constitutes or documents a communication. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. Lastly, the attorney-client privilege applies only to a confidential communication, meaning it was "not intended to be disclosed to third persons other than

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<sup>2</sup>Although you raise Texas Rule of Evidence 503, the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 is section 552.107. *See* Open Records Decision No. 676 at 6 (2002).

those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” ORD 676.

You state the e-mail and attached letter are also communications between the district’s representatives and its legal counsel that was created for the express purpose of soliciting legal advice and legal interpretation of issues. You state this information was not intended to be disclosed to third persons and the district has not waived its privilege. Based on your representations and our review, we conclude this e-mail, which we marked, may be withheld pursuant to section 552.107 of the Government Code. However, the attached letter was sent to the non-privileged requestor and is maintained separate and apart from the privileged e-mail. Therefore, we will address your argument under section 552.103 of the Government Code for this letter.

Section 552.103 of the Government Code provides, in relevant part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov’t Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref’d n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

This office has stated a pending complaint with the Equal Employment Opportunity Commission (the “EEOC”) indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982). You have submitted documents to this office showing that, prior to the district’s receipt of the request for information, the requestor filed

a complaint against the district with the EEOC. Based on your representations and our review of the submitted documents, we find you have demonstrated that litigation was reasonably anticipated when the district received the request for information. You represent the letter at issue serves as the source of the EEOC claim. Thus, we find the district has established this information relates to the anticipated litigation for purposes of section 552.103(a).

We note, however, that the requestor, as opposing party to the anticipated litigation, has already obtained this letter. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that relates to the litigation through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). Thus, if the opposing party to pending litigation has already seen or had access to information that relates to the litigation, through discovery or otherwise, there is no interest in now withholding such information under section 552.103. *See* Open Records Decision Nos. 349 (1983), 320 (1982). Therefore, the letter at issue, which we marked for release, is not excepted from disclosure under section 552.103 of the Government Code.

In summary, we have marked the information the district must release. We have marked the e-mail that may be withheld pursuant to section 552.107 of the Government Code. If the marked e-mail contained in the privileged e-mail string exists separate and apart from that e-mail string, it must be released. Otherwise, it and the remaining information may be withheld under Texas Rule of Evidence 503.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,



Kenneth Leland Conyer  
Assistant Attorney General  
Open Records Division

KLC/eeg

Ref: ID# 412559

Enc. Submitted documents

c: Requestor  
(w/o enclosures)